SECOND SESSION.

FRIDAY, APRIL 28, 1911, 10 O'CLOCK A. M.

The Society met at 10 o'clock a. m., pursuant to adjournment.

In the absence of the President, Honorable GEORGE GRAY, one of the Vice-Presidents, took the chair.

The CHAIRMAN. The lateness of the hour to which the meeting was extended last evening prevented us from having the full program for yesterday, so we will commence this morning with topic No. 2 on the list of last evening, and will hear Mr. S. Mallet-Prevost on "The principles governing national legislation affecting aliens."

Mr. MALLET-PREVOST. Mr. President and Gentlemen: Our distinguished president, Senator Root, last evening prefaced the reading of his very able paper by referring to it as some rambling remarks. If he were here this morning I should feel more trepidation than I do in reading my still more rambling remarks, but I venture to submit them for your consideration.

MR. S. MALLET-PREVOST, OF NEW YORK CITY,

ON

The Principles Governing National Legislation Affecting Aliens.

If we approach this question from the purely philosophic standpoint, the answer is apparent:

As the law of self-preservation is fundamental — with nations as with men — the treatment of aliens by a state must be determined primarily by the views which such state holds regarding its own necessities. The complete freedom of the state to act upon this principle is limited only by such international and moral obligations as rest upon it.

The soundness of these principles will, I presume, hardly be questioned: yet if our inquiry is to be more than theoretical, we shall have to deal with the subject along somewhat different lines.

Leaving theory for the moment, I invite you to consider with me the principles which have in fact operated in the past: in other words, I ask you to review briefly the history of alien rights, so that from the experience of mankind we may gather wisdom for the problems of today.

Generally speaking, the nations of ancient times were either under theocratic governments or else were organized upon a distinctly religious basis — religious, not from the moral, but purely from the political standpoint. In other words, the religion of the state constituted the political and juridical bond between the people.

In the case of each of these nations, a fundamental doctrine was that they were the chosen people of a particular god or group of gods. Some nations, like the Hebrews, denied the existence of any god but their own: others, like the Greeks, permitted to other peoples the possession of their own peculiar deities. As regards aliens, however, the result was the same in both cases. All religions were exclusive; the national gods were not world gods; deities were indifferent or hostile to people not their own; strangers were not permitted to profane the temples of the gods, nor to offer sacrifices at their altars, nor to be initiated into their mysteries.

This exclusion from the religious life of the community, coupled with the theory that all civil rights were dependent upon such participation, and that such rights emanated wholly from the particular deity or deities worshipped, led logically to the conclusion that aliens were persons without rights.

Keeping these principles in mind, it is not surprising to find that these ancient nations treated aliens with great harshness and cruelty. Excluded from religion, aliens were beyond the pale of divine protection; denied the possession of civil rights, there was no civil officer charged with the duty or clothed with the authority to defend them. Religiously and politically, they were outcasts, exposed to the emnity of the gods and to the passions and avarice of men. No considerations of morality could shield them, for the morality of the times taught that the destruction of strangers was a service to the gods. Under such conditions, the only hope for aliens lay in the self-interest of the people with whom their lot might be cast. If their lives were

spared, it was in order that their services might be utilized as slaves; if they were permitted to engage in commerce, it was because in the course of commercial development the state came to realize the advantages to be derived from that policy.

How fully the principles of self-interest controlled in those times is illustrated by the laws and practices then prevalent.

The doors of ancient Egypt were as firmly closed against strangers as were those of China a few decades ago. So jealously did the Egyptians guard their isolation, that even their own people were forbidden to go beyond the seas; and it was only after centuries of such isolation that commerce forced open the doors and brought Egypt into contact with the other nations of antiquity.

The origin of castes in India is doubtless due to an original difference between conquerors and conquered, that is to say between nationals and aliens — a difference which under conditions of intense religious fanaticism might well explain the absolute separation between the classes. The modern pariah, the outcast of India, may well represent the condition of his alien ancestor, and may faithfully reproduce the status of the alien in India at a time when that ancestor was a stranger in a strange land, or else a victim in his own land of a stronger alien conqueror.

The history of the Hebrews, full as it is of inspiration, of noble example and of high ideals, presents but a sorry picture when we consider their dealings with aliens. The Hebrew conquest of Palestine was terrible in its cruelty; and the injunction of Jehovah to utterly destroy the idolatrous nations whom the Israelites found in the land is an eloquent illustration of the regard in which in those times the Hebrew held his alien brother.

With the Greeks, the political conditions were somewhat different. Until after the Macedonian conquest, Greece was never a nation, but at most a federation of independent Hellenic communities. This at once established two different kinds of alien relations, namely, those between Greeks of different cities, and those between Greeks and non-Greeks, or barbarians. The first of these could hardly be called a true alien relation, because, however independent the various cities might be, they were, after all, bound by many common ties, ties of

religion, ties of tradition, ties of common ideals and aspirations; yet, politically, Athenians, Phebians, Dorians and Lacedemonians were distinct entities, and bore towards each other the relations of independent communities. Their internal wars, while emphasizing this separation, brought them into contact, and their alliances and treaties of peace served to unify them in a sense which up to that time was quite new.

This Hellenic unity led to a certain reciprocity on the part of the Greek cities in the treatment of their respective citizens; and although a Dorian in Athens had no rights which were recognized by Athenian law, he was, as a Greek, treated with a certain degree of consideration.

So far as Sparta was concerned, her ideals were essentially military, not at all commercial nor artistic; she regarded industry and art as adverse to her warlike spirit and habits, and therefore discouraged both. Her policy was one of isolation; hence she closed her doors to strangers.

Athens, on the other hand, was a commercial community and welcomed strangers; but, even in Athens, only certain especially favored strangers of *Greek* origin could be initiated into Athenian mysteries or could become participants in the favor of the Athenian gods. Other less fortunate Greeks might reside in Athens, and even non-resident Greeks were accorded some privileges; but barbarians, especially in the heroic age, enjoyed no right of protection whatever. Aliens of this latter class carried their lives in their hands, and might be despoiled or slain with impunity, unless, indeed, they were bound by the bond of "guest-friendship" with some Athenian, which brought them under the protection of Zeus the Hospitable. This "guest" relation illustrates how completely civil rights were at that time merged with religious principles. If an alien was fortunate enough to secure protection, it was not by virtue of any civil right vested in him, but simply because, for the moment, he happened to be placed under the shelter of an Athenian deity. Strictly speaking, a stranger was presumably an enemy who might be destroyed, first, because he was an enemy, and second, because it was nobody's business to protect or to avenge him.

Coming now to Rome, we shall find it worth while to consider somewhat more carefully the development of her alien laws.

The martial prowess of Rome, her material achievements, her artistic triumphs, even her political organization, were after all ephemeral. The one great, permanent contribution which Rome made to the world's advancement was those principles of law which she either originated or developed, and which consciously or unconsciously have served as the foundation of nearly all modern juridical systems. Many of the legal theories which we today accept as axiomatic are a heritage which we owe to the Roman jurisconsults. Those men were not only great lawyers, but great philosophers. They uncovered and applied principles which, because of the very necessities of human nature, and apart from any particular set of artificial rules, govern the conduct and the relations of man to man. It will be interesting, therefore, to see how those men solved the problem which we are considering, the problem of alien rights.

During the regal period, the position of aliens in Rome was much as it was in other parts of the world at that time. The *jus civile* was what its name implies and nothing more. It was a system of law framed exclusively for the citizens of the one city which in those early days constituted the Roman state. For those times it was enough. As yet, the only relations between the Roman and his Latin neighbors were relations of hostility. Born and reared under much the same religious system as the Greek, the Roman of those days was jealous of his gods, and recognized no rights in any one whom those gods did not protect. The Roman temples and the Roman forum were alike closed to the stranger.

But the extension of Roman power and the widening of her mental and material horizon wrought important changes. The proximity of other Latin cities precluded an isolated existence. Her spirit of conquest brought her into armed conflict with those cities; such conflicts ended either in conquest and the incorporation of those communities with the Roman state, or else in treaties which served as the foundation of inter-city, or what we should call, international, relations, where both parties were theoretically on an equality.

Treaties and relations of this character gave rise, in the course of

time, to the institution known as *hospitium,* according to which the inhabitant of a city which enjoyed treaty relations with Rome could, while at Rome, place himself under the protection of a Roman citizen. This first attempt to solve the problem of alien relations, and especially the procedure employed to make that protection effective, are characteristic of the legal theories of those days, and demonstrate how impossible it was for the world at that time to conceive of any rights as vested directly in the alien himself. The Romans recognized the *necessity* of protecting the alien, a necessity born of commercial, not at all of humanitarian, considerations; they could not, however, think of him as a person clothed with any rights of his own, but only as one whom Roman policy made it *expedient* and *desirable* to protect. Of course the alien could make no legal contract with his Roman protector, for the only law of Rome, the *jus civile,* was exclusively for Romans; neither, of course, could the Roman bind himself to any one who was beyond the pale of that law. A semblance of contract was, nevertheless, drawn up, and this writing was confirmed by the sanctity of an oath. The contract as such, was void, and even if it had not been, the alien could not have sued in the Roman courts, but the violation of the contract was regarded as a violation of the oath, and such violation was punishable. Thus it was that the Roman lawyer circumvented the old law and paved the way for a new system.

But the right of *hospitium* was limited to citizens of communities who enjoyed a certain equality with Rome and who had entered into treaty relations with her. As Roman growth continued, the *hospitium* was found to be insufficient for the needs of the increasing alien population. A new institution was therefore invented, by which a Roman might protect an alien who came from other parts; this was the institution of patron and client, which, unlike *hospitium,* implied a distinct superiority of the Roman over the alien.

Applied at first to single individuals, the scope of this institution gradually enlarged, until it became available for whole communities, and entire foreign cities placed themselves under the hereditary protection of some one or other of the great Roman families. Like *hospitium,* this institution was made effective by an oath.

As Rome extended her frontiers still further, however, these indirect methods of securing protection to aliens became too cumbersome, and Roman law at last began to take direct cognizance of the alien. This was, at first, the result of specific commercial treaties with foreign states. For instance, a treaty was made with Carthage about the third century B. C., which secured to Romans in Carthage the same commercial privileges which were enjoyed by the Carthaginians themselves. Reciprocally, the Carthaginians in Rome were, under this treaty, accorded the right to avail themselves of the juristic acts which, by the *jus civile,* had theretofore been reserved exclusively for Romans.

This idea of rights vested directly in aliens, having once entered the Roman mind, took root and rapidly grew. In the year 242 B. C., a special judge, the *prætor peregrinis,* was appointed for the exclusive purpose of dispensing justice to aliens; and under this system a completely new body of law was developed which was less formal and technical than the civil law, and which, in the course of time, came to influence the *jus civile* itself. The *jus civile* was naturally the model which the *prætor peregrinis* adopted, but he was also influenced by general equitable considerations, by the commercial customs which had gradually grown up, and, to a considerable extent, by the national laws of the aliens themselves, who in their dealings had often acted upon the basis of those laws. Thus it was that the *jus gentium* was finally evolved; and, with the extension of the Roman power to all of the then civilized world, it in time became the law for all, the *jus civile* becoming more and more a mere political code which gave to Roman citizens peculiar political privileges.

But, notwithstanding all this development, the Romans never reached the point where they regarded the complete outsider, that is to say the barbarian who lived beyond the confines of the Roman Empire, as vested with any inherent rights. However they might in practice treat him when he came within the Roman dominions, they never accorded to him any legal standing. To the Roman of the Justinian era, as to his ancestor of regal and republican days, barbarians remained what they had always been, people without rights, whom it was lawful to kill or despoil. Thus, in the end, the develop-

ment of this particular branch of Roman law was practically nil. While Rome had been growing, the necessity of dealing with aliens had been imperative because with each new conquest the number had been increasing, and their needs had pressed upon the attention of the Roman law-givers. When, however, the whole civilized world had come under Roman rule, the conditions wholly changed; the alien character of the population disappeared; former aliens became nationals; the *jus gentium,* which had been created for the exclusive benefit of aliens, gradually became the law for Roman nationals; and when at last the transformation was complete, there no longer remained any law available for the barbarians who, in the latter days of the Empire, were the only real aliens left. The alien's last condition was no better than his first; the stranger was still an enemy — a man without rights.

This reversion to first principles, if we may so characterize it, could not fail to have its effect upon the dark ages that followed the breaking up of the Roman Empire.

The Goths, the Vandals and the other Teutonic tribes who successively overran Europe came one after another under the influence of Roman civilization, and the systems of law which were adopted by them in the course of their transformation into national communities bore the impress of that influence. Had those hordes arrived a few centuries earlier, Rome might have had something to teach them regarding the legal status of aliens. As it was, those barbarians found in Rome merely a confirmation of their own rude theories on that subject. It is not surprising, therefore, that, notwithstanding the gradual development of those tribes into civilized nations, aliens should still, for some centuries to come, have continued legal outcasts.

Though the Teutonic denial of the existence of alien rights was, in its results, completely in accord with the Roman, the theory upon which that denial was based was radically different.

In the case of Rome, as we have already seen, the exclusion of the alien from civil rights was originally based upon his exclusion from religious privileges. With the Teutonic tribes, on the other hand, the status of the alien was determined by his relation to the military organization of the community. As, however, this military organiza-

tion was, at the same time, the Teutonic political bond of union, we have here, though in a very embryonic form, the beginnings of our own modern theories on the subject of allegiance.

With the Teutons, however, the allegiance was not to the state, for strictly speaking the state did not yet exist; neither was the question of nationality in any way complicated by territorial considerations, for the abodes of those Germanic peoples for a long time were constantly changing. Theirs was an allegiance of the simplest kind, namely a personal allegiance to a military chief. This kind of allegiance could lead to only one result, so far as aliens were concerned. To such primitive people, all who were not with them were against them, and hence those whom they conquered they either slew or enslaved.

This was the condition during the actual invasions; but, as these hordes became stationary, and as they came gradually into peaceful relations with each other and with the Roman or Romanized inhabitants whom they met, a curious and complex situation arose. According to the Teutonic ideas, allegiance was a personal relation between a man and his chief and had nothing whatever to do with territorial considerations. To the Teuton, therefore, every man, wherever he might be, carried his allegiance, and hence his laws, about with him. The consequence of this was that in a Teutonic community, where Romans mingled with Goths, and where members of different Teutonic tribes dealt with each other, each man was the subject of a different law and was dealt with accordingly. It is clear that no great progress could be made under conditions so uncertain, so complex and so contradictory; and it is not surprising that, partly because of this, we look back upon those as the dark ages in European history. Such confusion, however long it may have continued, must be regarded as a passing or transition phase from the earlier and more primitive conditions to the conditions of territorial sovereignty which were introduced by the feudal system.

The change from a personal to a territorial theory of government, whatever benefits it may have secured, was certainly not favorable to the status of the alien. The feudal system was a military system built upon the foundation of land tenure. One of the essential ele-

ments was allegiance to the lord of the land. But an alien was bound by fealty to his own lord; this fealty he was not at liberty to renounce; and as he could not therefore become the vassal of a foreign prince, he had no right to place himself under that prince's protection. The result was that, under the feudal system, the alien continued to be an individual without rights, and hence could be nothing but a serf. This situation continued until about the fifteenth century, when serfdom gradually passed away.

This review of the status of aliens in ancient and mediæval times would be incomplete without at least some passing reference to still another system which we find in Mohammedan history, and which occupies a place in modern international law in the shape of "Capitulations" in Turkey and Egypt. Rome, at first a military power, became in the end preëminently a commercial nation. Her necessities made the rest of the world tribute to her, not merely in a political sense, but in the sense that she became the great market for the products of all the known world. The spices of the East, the silks and ivory of Asia, and the many products of the Orient came to her over the trade routes of Arabia and Egypt. So long as Asia Minor, Palestine and Egypt remained in Roman hands, the trade may be regarded as in a sense domestic; but, when Rome began to decline, and when the Mohammedan power began to rise, a gradual change took place. One after another of the Eastern ports fell into the hands of the Mohammedans. During the seventh century Syria, Egypt, Carthage and, finally, the whole northern coast of Africa, became Mohammedan; even Spain fell under Mohammedan rule.

The Mohammedan law, embodied in the Koran, divided the entire world into two classes; those who were and those who were not followers of the Prophet. Between these two there was declared to exist a continual state of war. To the Mohammedan, therefore, every alien was an enemy to be either converted, in which case he ceased to be an alien, or else to be destroyed.

But this fanatical determination to destroy yielded at last to the economic exigencies of the Mohammedans. Instead of killing alien communities, they concluded by granting to them the enjoyment of certain privileges. At first such grants were exclusively commercial;

but, as the number of favored foreign merchants increased, there were allowed to them certain other privileges. The Venetians, for instance, had assigned to them special quarters in Jerusalem, where they lived and carried on their trade. The scope of these grants was gradually enlarged until they came finally to include certain immunity from local Mohammedan jurisdiction, the foreigners being permitted to administer their own laws. It was through grants of this character, which, because of their form, were from very early times known as "Capitulations," that aliens acquired civil rights under Mohammedan rule. And it is by virtue of more extended but in principle exactly similar "Capitulations," that foreigners today enjoy rights in Egypt and Turkey. The foreign consular and mixed courts in Egypt are an outgrowth of this system.

The feature of all this which is pertinent to our inquiry is that, under the Mohammedan juridical system, as under the Greek and the Roman, the alien, as such, had no rights; and that if protection was accorded to him it could only be through special grants or treaties which placed him — not as a matter of right, but merely as a matter of grace or barter — in a juridical position which he could not otherwise occupy.

How different from all these principles and theories are the rules which we of today regard as controlling, and yet how natural has been the evolution!

First, the alien was an enemy to be slain: the result of course was his extermination.

Next, he was an instrument to be used: the result was his slavery.

Then, he became a more profitable kind of instrument, namely a merchant: the result was a gracious abstention, on the part of the state, from doing him injury, not because *as a man* he was entitled to protection, but simply because *as a merchant* he brought material wealth to the community, and because it was therefore to the interest of the state to protect that particular source of revenue.

Then, with the growth of international relations, born of countless wars, of treaties and alliances and, most of all, of the necessities of international commerce, nations began to assume obligations toward each other, obligations of a character quite unknown to the ancient

of to the mediæval world. These obligations were still based, however, exclusively upon the theory of reciprocal advantages; and hence were, after all, merely an expression, in a new form, of the primeval law of self-preservation and of selfish advantage. However, the right theretofore existing to deal with an alien's life and property at will, was for the first time modified by the limitation which these newborn international obligations introduced; and this curtailment of the original right paved the way for the adoption of still more advanced theories as to the inherent rights of aliens.

Finally we come to the last stage of this evolution. No longer enemies, no longer serfs, no longer mere instruments of trade, aliens, under the gradual development of democratic ideals and the teachings of a humanitarian religion, were at last revealed to nations in their true light as human beings, whom nature had endowed with rights which, not only their own governments, but foreign states as well, were politically and morally bound to recognize and respect.

Man is not only a citizen of a state, but in a larger sense a citizen of the world. He has the inherent right to live; and this right necessarily carries with it the derivative rights to freedom and to the acquisition of property. If a man can not live in one country, he is, by the law of nature, entitled to move to another; and, having been admitted to that other, he is again entitled to live.

The ancient conception as to the functions of the state have passed forever. Men are no longer the victims of the gods, nor the slaves of their fellows, nor the mere instruments of the state, nor even the subjects of kings. The word "subject" in its original sense has become obsolete among modern civilized nations. States are not maintained for the benefit of the few, but for the good of the whole. In this enlightened age, a nation is a social organism, charged above all with the mission of safeguarding justice and right. A government is a body which is not only vested with public powers, but also charged with public duties. As the representative of the national community, it is entrusted with the material and also with the moral interests of all who dwell under its control. Not only so, the modern state is no longer an isolated unit: it is a member of an international community, enjoying communal privileges and charged with communal

obligations. It is one of its functions to advance the general *entente* between nations; not only that as a part of the whole it may derive resultant benefit, but also that in a purely altruistic sense it may contribute to the general good. With every passing century — almost with every passing decade — the *national* mission of states is becoming more and more a *world* mission; and the citizens of each state are becoming more and more citizens of the world.

While maintaining this doctrine, let us not, however, lose sight of the most effective method of practically carrying it out. In the end, the state that best discharges its domestic duties is the state that comes nearest to meeting its world obligations. Charity always begins at home; and this is preëminently true of the state, whose primary function it is to care for the domestic needs of its own people. It is, therefore, not only the right, but the duty, of a state prudently and reasonably to safeguard its national interests. We live in no Utopia; human nature is still very human; the era of altruism has as yet barely dawned; the principle of self-protection is still a principle which must largely regulate our conduct. Therefore, a state must protect the nation's industrial and commercial standing and independence; it must preserve the integrity of its national territory; it must safeguard the health and the morals of its own people. In the effectual performance of these duties, it is still necessary to regulate the admission of aliens and in a measure to limit their political and civil rights. So far as such regulations and limitations may be essential to the safety and well-being of a state — and no farther — they should become a part of that state's national legislation.

These, I submit, are the principles which should govern.

The Chairman. I am sure I voice the feeling of all present when I say that we owe Mr. Mallet-Prevost our sincere thanks for the very interesting and able paper read by him.

The paper of Mr. James Barclay, who is unavoidably absent, will be read by Mr. Coudert.

Mr. Coudert. Mr. President, I perhaps should express the regret of my friend Mr. Barclay at his not being present. There are several reasons why he is not present. One is that he is at this moment in

the Republic of Santo Domingo. There are also other reasons, but perhaps it is unnecessary to state them. As I am wholly unselfish in this matter, I must admit that I have not written this paper, although I might have been tempted to claim credit for it if the President had not so candidly insisted that I was only to read it for Mr. Barclay. I must state in all unselfishness that it is a most excellent paper. My friend Mallet-Prevost's paper was so exhaustive that it might seem almost temerity to read a paper written by somebody else on the same subject, but I can only say in defense of my apparent audacity that it does not touch on the matters which Mr. Mallet-Prevost has spoken about, and does not merely follow in the thread of his discourse in which event it would run the danger of merely attenuating it. I will now read this excellent paper:

ADDRESS OF MR. JAMES BARCLAY, OF NEW YORK CITY,

ON

The Principles Governing National Legislation Affecting Aliens.

At the head of Fiore's treatise on *Private International Law* stands a quotation from Laboulaye, which may be translated as follows:

The foreigner is no longer an enemy as he was in antiquity, a serf as he was in the middle ages, nor an "aubain," as he was in the eighteenth century; he is a guest to whom all civil rights are conceded, and who is welcomed as a friend.

In these lines we may find an epitome of the history of the changing attitude of the state towards the foreign dwellers within its boundaries, perhaps more picturesque than accurate, and in its conclusion tinged with a certain degree of optimism, but sufficiently exact to serve as a summary record of the transformation that time has brought in conceptions and in sentiment.

It is true that even in antiquity and in the dark ages circumstances compelled exceptions to the rule which regarded the foreign-born as an enemy, and it is also true that even under the most liberal modern practice the position of the resident foreigner is not yet absolutely

assimilated to that of the native. But we may well read in the exception of favored classes and individuals from the rigors of ancient or of medieval law the evidence of the growing forces that were gradually to overthrow the system; and in the contrary exceptions which still subsist in modern jurisprudence, if properly scrutinized, we may often find a trace of the reason that lay below the ancient practice.

Some of these exceptions are doubtless mere anomalies destined to disappear with time and with the allaying of old prejudices; some have a better foundation in the relations of existing states and in actual conditions which it may be hoped will yet be modified; some again are more securely based on fundamental distinctions and the nature of things.

It can not be altogether ignored when we congratulate ourselves upon the progress which we discern in mutual respect for the rights of the foreign-born, that this progress is in great part an immediate consequence of the unifying force of modern civilization, which has created a bond of international brotherhood among the Christian nations. Where radical differences of race and religion exist, the process is far from complete, and we still find the European in China, Siam or the Levant insisting with much reason on extraterritoriality and his consular courts; and sometimes we remark in the reception and treatment with which the natives of these countries meet upon our own soil something of the spirit which of old confronted the barbarian or the outlaw.

Even if this be so, there is a constant tendency to establish general principles resting upon a moral and scientific basis, and governing the relations of the state to foreign-born residents or sojourners. Some of these principles are still under discussion, and as may well be supposed, their application gives rise to a wide variety of opinions; but yet, looking more especially to the legislation and the jurisprudence of continental Europe, we are not left in doubt as to the existence of certain broad general tendencies, nor in cases where these tendencies appear partly to conflict are we altogether without a guide as to their respective moral force and weight.

We shall not go far astray in taking the French Revolution as our

starting point. It is true that already under the monarchy the *droit d'aubaine,* in virtue of which the foreigner was, in France as in most European countries, incapable of transmitting his property by legal or testamentary succession, had been much attenuated by treaties. But the revolutionary legislation in 1790 and in 1791 established a principle. The *droit d'aubaine* was abolished and the foreigner rendered capable of succeeding in intestacy; and the ground was the discovery that his manhood was immeasurably more important than his citizenship.

Then in 1804 comes the Code Napoleon. A different spirit presides over its creation, rather of calculation than of generosity.

It is true that provision is made for the creation of a specially favored class of resident foreigners, those, namely, who have been authorized to fix their domicile in France. But this intermediate state is in the nature of a preparation for citizenship, and may, like its analogues elsewhere in America and Europe, be left out of account for the present. It is enough to say that such a domiciled foreigner enjoys by special dispensation nearly, if not quite all, the civil as distinguished from the political rights of the native.

Under Article 11 the undomiciled foreigner enjoys in France the same civil rights as are granted to citizens of France by the treaties with the nation to which he belongs. And this general provision was reinforced in matters of succession by Articles 726 and 912, which regulated the right of the foreigner to succeed to property situated in France, by the same condition of reciprocity.

This then was the new regulative principle introduced to curb the impractical enthusiasm of the idealist who had sought to build law on the basis of mere abstract justice — *Reciprocity.* Curiously enough, by the year 1819, under the Restoration, it had been discovered that in the matter of succession at least, reciprocity was too costly, and that the impractical theory was the more financially practical, and Articles 726 and 912 were unconditionally repealed and the last trace of the *droit d'aubaine* abolished; but, as we are assured by all the authors, Mourlon, Aubry, etc., on this occasion for purely selfish and economic reasons and without any reference to the abstract principles of justice.

The idea of reciprocity, however, is still embodied in the French Code as the principle governing the condition of foreigners.

The Code Napoleon is truly the mother of the modern codes, and it is interesting to trace the appearance or absence of this feature in the daughters.

As the typical embodiment of the more liberal policy in its simplest form, we may take Article 3 of the Italian Civil Code: "The foreigner is admitted to the enjoyment of the civil rights attributed to citizens." With this we escape at one step from the labyrinth into which we are led by the elusive rule of reciprocity. It is indeed the substitution of a law for a bargain. As Esperson puts it, "The equality of foreigner and national is the basis of private international law," adding that the Italian legislator in proclaiming this equality has given a noble and generous example to other countries. The system has at all events the merit of simplicity and offers evidence of faith in real principles underlying international law, and it appeals with great force to many of the French writers. Thus, Huc in his *Studies on the Italian Civil Code:*

It was indeed time for the disappearance from modern codes of this outworn principle of reciprocity, a paradoxical conception which assigns to a nation as a rule for its conduct, not the idea of justice, but the uncertain adhesion of another nation lagging behind in the way of progress.

It must be noted that the reciprocity to which French jurisprudence was committed was a diplomatic reciprocity, that is, it could only be established by treaty and not at all by evidence that under the maxims or administration of the foreign law a French citizen would be admitted to civil rights. The rule was somewhat rigorous, and very naturally the expression "civil rights" invited construction and definition. There was a school which insisted upon the literal construction of the term, excluding the foreigner from all rights to which he was not expressly admitted; but the forces of civilization were on the other side, and the result was not in fact long in doubt. It was finally held that foreigners in France have practically all civil rights except those which are distinctly withheld.

The reasoning by which the result was attained is of no great im-

portance, and it varies as stated in the different authors, for example, Mourlon, Weiss and Aubry & Rau, the last of whom base the distinction upon rights arising from the *jus gentium* and those derived under national law; but the important matter is that, as there are certain necessary exceptions and limitations to the Italian rule, the two systems, starting from opposite points, under the influence of liberal thought and the compelling forces of modern civilization, have reached an end not much dissimilar. And it is very necessary, in looking at the codes and constitutions which have borrowed more or less closely the language of the French or the Italian Code, to remember that the exceptions are sometimes more enlightening than the rule, and that the spirit of the construction may be much more important than the letter of the law.

Thus, the example of Italy has been followed by The Netherlands, Spain, Portugal, Roumania, and Russia, and in many of the South American states, to the extent of the establishment of the general rule of equality; but the special exceptions made in many cases derogate not a little from the apparent liberality.

In what respects does the foreigner differ from the citizen in modern practice?

It is usually admitted that he is in no case entitled to enjoy civic or political rights. There may be some margin of doubt as to whether certain privileges are to be so described, but it is not a wide one. On the other hand, there are certain duties imposed on the citizen, such as military service, from which the foreigner is undoubtedly to be held exempt. Here, too, questionable cases may occur, as in time of siege, or where in colonies situated in savage countries a system of local defense is organized.

Again, there is a wide range of rights which are everywhere conceded to belong to the stranger in the same degree as to the citizen, rights which are derived from his manhood and not from his citizenship; while against these rights and privileges stand the duty of obedience to the penal and police laws and the payment of all general taxes regularly imposed.

Lastly, we come to what are more properly termed civil rights and which arise rather from positive than so-called natural law.

Here there is the widest difference in the practice and theory of the various states, and yet it is only in a very limited number of matters that at the present day and among the kindred nations of Europe any distinction is drawn to the material disadvantage of the foreigner. To indicate these hastily, and without pretending to an exhaustive survey, there are the important questions of succession and the right to take and hold real estate. There are also certain disabilities in proceedings before the courts, such as the obligation to furnish security for costs when suing a citizen, liability to be sued at the domicile of the citizen plaintiff, incapacity to act as guardian of a minor, to adopt or be adopted. There are also laws relating to matters which, while not strictly political, are held to involve the public interest, such as those limiting the share which may be held in a vessel by a foreign owner, and sometimes forbidding entirely the employment of a foreigner as master or officer on a vessel. There are discriminations against the foreigner which have rather an economic origin, as, for example, in the copyright and trademark laws of certain countries and sometimes in workmen's compensation or compulsory insurance laws.

There is also the supreme difference which exists even where the general rights of the citizen are conceded in the most generous manner to the resident foreigner, that the latter is at any time subject to expulsion if the interests of the state in the opinion of the executive demand it.

In regard to this last matter it may be dismissed in a very few words as an essential power of the state which can not be surrendered. The only question that can present itself is as to the proper manner of its exercise. As indicated, it has been generally held to reside in the executive with appeal to the courts open only on the question of the national status of the person to be expelled. Not many years ago this view was hardly open to practical doubt — expulsion was essentially a war measure and a weapon for offense or defense in the hands of the executive power. More recent developments consequent on the great migratory movements of populations towards certain territories have resulted in laws tending to protect the nation against the foreigner, not as such merely or on account of his possible

hostility, but individually as a physical or moral menace. This has necessitated the provision of machinery of a semi-judicial nature to deal with individual cases of rejection or expulsion. The modern tendency while recognizing the right, must necessarily be against the arbitrary exercise, and in favor of its subjection, so far as is in the nature of the case possible, to judicial routine and regulation.

There is one other case of the abridgment or denial of a civil right, as to which it is fairly possible to argue that not mere selfishness or exclusiveness, but a respectable political or economical reason is sometimes beneath it. That is the limitation on the right to hold real property. The same reasons have probably contributed to preserve the anomaly by which an alien was forbidden either to transmit or to take realty by inheritance, even when all similar disabilities as to personal property had been swept away. Here, however, a *via media* was readily found and applied by treaty in numerous cases under which the alien was given a limited time to dispose of his inherited property. And it will be observed that it was in the countries which clung to the theory of the territoriality of laws that this anomaly subsisted longest. It is a curious fact that the countries, such as England and many of the States of the Union, which in their jurisprudence made of least force the bond between the citizen and his nation, deriving civil rights rather from domicile, seemed at the same time to regard as peculiarly sacred the soil of their territory, and carefully provided against its transmission to men of another allegiance.

We have here rather a traditional force which Fiore derives from the operation of the feudal system, and which is in any case different in nature from the political and economic reasons for which Mexico forbids aliens to acquire land without special authorization within sixty miles of the frontier or thirty miles of the sea, or for which Russia forbids foreigners to become landholders in certain of her provinces. Perhaps we should add to these the laws which in many States of the Union deny the right to hold lands to nonresident aliens. These measures are indeed analogous to the drastic provisions by which the white races in America and elsewhere have put a check upon Asiatic immigration. Like the right of expulsion itself, they

are hard to bring within the humanitarian theories of modern jurisprudence, and exist as a kind of unresolved elements which have not been properly placed in the system.

As to the matter of succession generally, we have seen that it is nearly a century since France abolished all invidious distinction. Belgium followed closely in her footsteps. Spain, Italy, Denmark and The Netherlands grant all the rights of the native in this regard to the foreigner. Great Britain, after long delay in regard to real estate, followed at last in the same course, and, generally speaking, it may be said that in this important domain, liberal principles have triumphed, except where here and there, as in Austria and Sweden (and in various States of the American Union), the condition of reciprocity remains in some form embedded in legislation or practice.

This is not altogether the case in reference to the discrimination still very general against the foreigner when he appears in court as a plaintiff. Italy, Portugal and Denmark have apparently abolished the discrimination, but in most countries the foreigner suing a citizen is still required to furnish security for costs, unless the condition is dispensed with by treaty. The rule has, of course, a basis in reason, and, while not strictly logical when founded merely on citizenship, is not, on the whole, extremely burdensome or anomalous. A much stronger argument indeed can be made against another discriminative provision of the French and Belgian Codes, whereby a citizen is permitted to sue a nonresident foreigner in the court of his own (the citizen's) domicile. Esperson frankly describes this as an outrageous provision and contrary to the law of nations.

The ostensible object of the demand for security being to preserve the rights of citizens as against unscrupulous foreign litigants, the matter seems particularly ill-adapted for adjustment by treaty, unless indeed, as has been suggested, the treaty should provide for some simple method of collecting the judgment costs in the foreign jurisdiction. Brazil appears to have found an easier and more logical solution in demanding security from all nonresidents and dispensing with it in the case of all residents, whether native or foreign.

These, like most other circumstances relating to judicial capacity, are matters of old tradition. But there is another kind of discrimina-

tion which is rather the result of modern industrial developments. It is based on the attempt to secure a certain advantage for labor or invention in the international industrial competition. Examples of this are found in the various laws for protection of copyright and trademarks, or in the industrial accident indemnity law, as enacted in Germany, France and some other countries, and perhaps it is not too much to say that we have the same kind of legislation in the contract labor law. In some directions, and especially in matters of copyright and trademark, conventions and international agreement have done much to minimize national preferences. In other cases, the policy of the discriminative law, even from the point of view of the nation that enacts it, is still being subjected to criticism.

Pessimism, in view of such recent developments, would be out of place. The force of organized class interest is great in the modern state, especially when it can make a plausible pretext of patriotism, but the history of international economics shows that there is nothing new, either in the motives or the methods that come into play. What is new is that even selfish interest today is not so stupid as it once was, and is infinitely more amenable to the influence of reason and of the humanitarian and other motives that co-exist in modern life.

On the whole, while it would be difficult to draw up a code of the principles governing the legislation of modern European nations affecting aliens, it is not hard to discern the tendencies and certain broad outlines.

Political rights are reserved for the citizen, and policy may sometimes dictate that certain positions not strictly political but of high possible importance in view of the condition of the naton, such as that of officer or owner of a seagoing vessel, be similarly limited.

As to the right to debar aliens from entry and to expel them in case of necessity or for valid reasons, there can be no question. It is inherent in the sovereignty of the state. But modern theory holds that this right should be exercised in conformity with broad principles of justice and in an orderly and considerate manner.

As to the generality of civil rights, they are in fact almost universally conceded, either without reserve or on condition of a reciprocal concession by foreign nations. The current sets strongly against

the idea of reciprocity as a measure for justice or policy, and the obstacle to a complete assimilation of the rights of alien and native born, no longer a mere dream, is not to be found in the theories of jurists, but in the great and dangerous forces of national jealousy and economic selfishness. We can not forget that these forces are inextricably bound up with the instinct of national self-preservation, but enlightened and progressive legal theory will persistently and constantly struggle against their more extreme manifestations as embodied in legislation, with an abiding faith that the principles of justice can be ascertained, that a measure of generosity is a condition of putting these principles in practice, and that only in justice done with generosity is there ultimate profit to either party. In the meantime, and till the golden age returns, a *quid pro quo* is dear to the heart of the statesman, and the system of conventions and reciprocal concessions is, in many directions, ameliorating conditions of friction and depriving international competition of its most dangerous weapons.

The CHAIRMAN. We thank Mr. Coudert for his evident assimilation of the very clear and lucid argument of Mr. Barclay.

The next upon the program is the subject of "The admission and restrictions upon the admission of aliens." You will first listen to an address by Honorable Charles Earl.

ADDRESS OF HONORABLE CHARLES EARL, SOLICITOR FOR THE DEPARTMENT OF COMMERCE AND LABOR,

ON

Admission and Restrictions upon the Admission of Aliens.

The right of any nation to deny admission to aliens is necessarily opposed to such rights as aliens themselves possess as individuals to journey where they will, and to such rights also as other states possess, whether founded on general consent or express agreement, to assure for their citizens or subjects the freedom to enter and reside in the territory of friendly Powers.